563620
36 pgs Nos. 07-21 and 07-25

In The
Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* GEORGIA SECRETARY OF STATE KAREN C. HANDEL IN SUPPORT OF RESPONDENTS

THURBERT E. BAKER
Attorney General of Georgia
DENNIS R. DUNN
Deputy Attorney General
STEFAN E. RITTER
Senior Assistant
Attorney General
STATE LAW DEPARTMENT
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-5614

MARK H. COHEN*
TROUTMAN SANDERS LLP
Bank of America Plaza
Suite 5200
600 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 885-3597

*Counsel of Record

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ANNE W. LEWIS
STRICKLAND BROCKINGTON LEWIS LLP
Midtown Proscenium, Suite 2000
1170 Peachtree Street, N.E.
Atlanta, Georgia 30309
(678) 347-2200

TABLE OF CONTENTS

Page

Table of Authorities iii

Statement of Interest of *Amicus Curiae* 1

Summary of Argument 3

Argument 5

I. The State of Indiana, Through Its Elected Legislature, Has Demonstrated a Reasonable and Rational Basis for Its Photo ID Requirement, Which Imposes No Undue Burden on Any Voter 5

II. The Facts Underlying the *Common Cause/ Georgia v. Billups* Decision Support the Upholding of Indiana's Photo ID Requirements 13

A. The Requirements of the Georgia Photo ID Statute 14

B. After Extensive Discovery, Preliminary Hearings, and a Trial on the Merits, the Georgia Photo ID Statute Was Upheld and Successfully Applied in Elections Conducted in Numerous Jurisdictions Across the State 16

C. No Evidence Exists That Hundreds of Thousands of Georgia Voters Lack Photographic Identification 21

TABLE OF CONTENTS – Continued

Page

D. The District Court in the *Common Cause / Georgia* Litigation Found That the Evidence *Amici* Secretaries Cite Regarding the Georgia Photo ID Law's Effect on the Poor, the Elderly, and Minorities Was Unreliable and Consequently Inadmissible 24

III. There Is No Evidence to Support the Allegation or Prediction That Any Individual Voter's Right to Vote Is Burdened by the Photo ID Laws in Either Indiana or Georgia 26

Conclusion 29

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983) 6, 7

Berry v. Perdue, No. 06CV4751-7 (DeKalb County Super. Ct. filed Apr. 12, 2006) 18

Burdick v. Takushi, 504 U.S. 428 (1992) 5, 6, 7

Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007) ..... *passim*

Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) 17

Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) 10, 16, 21

Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007) 7

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 25

Dunn v. Blumstein, 405 U.S. 330 (1972) 5

FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) 9

Griffin v. Roupas, 385 F.3d 1128 (7th Cir. 2004) 12

In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71, 479 Mich. 1 (2007) 7

Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006) 20, 27

TABLE OF AUTHORITIES – Continued

Page

McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969) 9

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 8

Perdue v. Lake, 282 Ga. 348, 647 S.E. 2d 6 (2007) 18

Purcell v. Gonzalez, __ U.S. __, 127 S. Ct. 5 (2006) 23, 24, 28

Storer v. Brown, 415 U.S. 724 (1974) 5

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 8

Welker v. Clarke, 239 F.3d 596 (3d Cir. 2001) 11

Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483 (1955) 9

CONSTITUTIONS AND STATUTES

U.S. CONST. art. I, § 1, cl. 1 5

42 U.S.C. § 1973gg(b)(1) 11

42 U.S.C. § 15483(b) 11, 12

Help America Vote Act of 2002 ("HAVA"), *codified at* 42 U.S.C. § 15301, *et seq.* 11

National Voter Registration Act of 1993 ("NVRA"), *codified at* 42 U.S.C. § 1973gg, *et seq* 11

O.C.G.A. § 21-2-385 14

O.C.G.A. § 21-2-386 14

TABLE OF AUTHORITIES – Continued

Page

O.C.G.A. § 21-2-417 ..... 15, 23

O.C.G.A. § 21-2-417.1 ..... 14, 16

O.C.G.A. § 21-2-419 15

O.C.G.A. § 40-5-103(d) 16

OTHER AUTHORITIES

M.V. Hood III and Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute* 19 (2007), *available at* http://www.votecaltech.edu/VoterID/GAVoterID (Bullock-Hood).pdf 25

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The interests of the Secretary of State of Georgia, Karen C. Handel, in presenting this brief to the Court, are unique compared to other *amici*. The Georgia experience presents a real-life demonstration that the operation of a photographic identification ("photo ID") requirement for voting creates no impairment or disenfranchisement of the right to vote. Additionally, after two years of litigation in both state and federal courts in Georgia, including extensive discovery, a series of preliminary injunction hearings, and finally a trial on the merits in the district court, Georgia's experience demonstrates the palpable lack of injury to any voter and the paucity of the constitutional challenges to the photo ID requirement.

As the chief election official for the State of Georgia, Secretary Handel is responsible for ensuring the integrity of the state's elections. Secretary Handel believes that the Indiana photo ID law, like Georgia's own statute, protects against in-person voter fraud, which is otherwise nearly impossible to detect without a photo ID requirement. She also believes that election integrity requires her office to educate all

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or her counsel made a monetary contribution to its preparation or submission.

eligible voters of voting requirements, including the photo ID requirement. Therefore, following the district court's decision upholding the Georgia law, Secretary Handel undertook and continues an extensive voter education program, similar to Indiana's, to ensure that all eligible Georgia voters who desire to vote in person have the required photo ID, understand how to obtain a free photo ID if they need one, or are apprised of their ability to vote a mail-in absentee ballot without any excuse for doing so and without a photo ID. Secretary Handel is concerned that other *amici* have not accurately described either the implementation of Georgia's photo ID law or the decision of the district court in reviewing and upholding the photo ID requirement.

Consequently, Secretary Handel as *amicus curiae* submits this brief to assist the Court in evaluating a photo ID requirement in both legal and practical terms and in support of the State of Indiana in this appeal. Secretary Handel asserts that a photo ID requirement is an important option for all states to have available to protect against voter fraud. A photo ID requirement is consistent with this Court's standards for reviewing and sustaining election laws and should not be overturned based upon some hypothetical third party concerns which have not materialized in actual implementation of the requirement.

SUMMARY OF ARGUMENT

Indiana's requirement of the presentation of a photo ID for in-person voters in order to guard against voter fraud at the polls is rationally related to the state's important regulatory interest in protecting the integrity of the election process. This Court's precedent supports the Seventh Circuit Court of Appeals' opinion that when there is no evidence of any undue burden imposed upon voters by an election statute and there is a recognized justification for the state's regulation, strict scrutiny will not be applied. Because it is nearly impossible to detect in-person voter fraud without a photo ID requirement, it is within the authority of state legislatures to choose that option of voter identification at the polls.

Georgia law requires that persons appearing to vote in-person either present one of many types of government-issued photo ID cards or vote a provisional ballot and return to the registrar with an appropriate photo ID within two days of the election. After two years of federal and state court challenges to the enforcement of Georgia's statute, all challenges ultimately have been rejected. Despite the predictions of widespread disenfranchisement resulting from the photo ID requirement, no plaintiff in any of the Georgia litigation, either as an individual or as an organization, demonstrated any injury which provided him or it with standing to challenge the photo ID requirement. Furthermore, after trial, the United States District Court for the Northern District of Georgia not only dismissed the case for lack of

standing but also went on to address the merits of the plaintiffs' claims and concluded that the case failed on the merits as well. Following the district court's decision, Georgia conducted two series of elections in over two hundred jurisdictions across the state in which the photo ID requirement was universally applied. There has not been one single demonstrated deprivation of any right to vote or any other violation of a constitutional or statutory right resulting from the photo ID requirement. Contrary to Petitioners' and other *amici's* hypothetical protestations, there has been no showing of any voter disenfranchisement due to the photo ID requirement for in-person voting.

Like the legislature in Indiana, Georgia's General Assembly chose to address the potential for voter fraud at the polls through passage of a photo ID law, a decision representing the judgment of elected representatives. This Court should not overturn the Indiana legislature's judgment because of any alternative proposal propounded by a partisan group of Petitioners and other *amici* when the state-elected representatives' choices are supported by the constitutional standard of review.

ARGUMENT

I. The State of Indiana, Through Its Elected Legislature, Has Demonstrated a Reasonable and Rational Basis for Its Photo ID Requirement, Which Imposes No Undue Burden on Any Voter.

The very foundation of Petitioners' cases before this Court is built on the faulty assumption that Indiana's photo ID law, and presumably any law requiring the presentation of a government-issued photo ID for in-person voting, is subject to heightened scrutiny under this Court's decision in *Burdick v. Takushi*, 504 U.S. 428 (1992). That assumption is incorrect, in conflict with the precedent of this Court, and does not support Petitioners' position.

The authority to regulate elections, including "the initial task of determining the qualifications of voters," is given to the various states because "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974) (citing U.S. CONST. art. I, § 1, cl. 1); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.").

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, *or the*

> *voting process itself*, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends."

Burdick, 504 U.S. at 433 (emphasis added) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Because state regulation is absolutely necessary to ensure that the electoral process is fair and honest, state election laws are, generally, not subject to strict scrutiny review. "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433.

Instead, in determining the level of scrutiny applicable to a challenged state election law, this Court has prescribed a balancing test in which "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" are weighed against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. Under this sliding scale analysis, only when the restrictions placed on voting rights are "severe" will the regulation be subjected to strict scrutiny. *Burdick*, 504 U.S. at 434. "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters," the rational basis test is

applied, and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

The argument of Petitioners and the *amici curiae* Current and Former Secretaries of State ("the *Amici* Secretaries") that the Indiana photo ID law should be subjected to strict scrutiny and invalidated on grounds that there is little evidence of voter impersonation ignores two important points. First, in-person voter fraud is extremely difficult to detect, as the Court of Appeals recognized in deciding the Indiana case below. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007) (describing the difficulty in apprehending and prosecuting voter impersonators); *see also In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 25 (2007) ("[W]ithout a personal identification requirement it is nearly impossible to detect in-person voter fraud. In-person voter fraud is, by its very nature, covert."). On this point, the experience and opinion of Secretary Handel, who is currently charged with regulating and has regulated elections within the State of Georgia, is consistent with the Seventh Circuit Court of Appeals' reasoning. Without a photo ID requirement for in-person voting, it is nearly impossible to catch an imposter who casts a vote for another registered voter on Election Day, particularly when the actual registered voter does not cast a vote in that election which, according to voter turnout statistics, sadly is more likely to be the case than not. In such case, no opportunity even arises for

a poll officer to question that two individuals have appeared to vote and are claiming to be the same person. Absent such an obvious controversy regarding a voter's identity or the happenstance that a poll worker actually knows the real voter by sight, there is virtually no other practical way to assure that the person appearing to vote is actually the registered voter entitled to vote.

Second, suggestions by Petitioners and the *Amici* Secretaries that the elected legislature of Indiana, and presumably all other states, should choose some other method for validating the identity of a voter appearing at a polling place cannot serve as a basis for invalidating Indiana's photo ID law. The legislature alone – not political parties (such as Petitioners) or executive branch officers (such as the *Amici* Secretaries) – is vested with the responsibility to impose its own preferred methods for addressing voter fraud.

Additionally, only the legislature is accorded the judgment to determine the timing and extent of its response. For example, this Court has emphasized that elected officials should be permitted to respond to electoral process deficiencies "with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). "[E]laborate, empirical verification of the weightiness of the State's asserted justifications" is not required. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Likewise, a legislature is not required to solve all possible evils at once and may choose among various alternatives,

even if the chosen alternative will not completely eliminate the evil.

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *The legislature may select one phase of one field and apply a remedy there, neglecting the others.* The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (emphasis added); *accord FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993); *see also McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) ("[A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.").

The Indiana General Assembly, as did the Georgia General Assembly, chose to address the potential for voter fraud at the polls through the passage of a photo ID law. These enactments represent the considered judgments of elected representatives regarding how best to address the potential and real issues of voter fraud and, as a matter of law, cannot be reversed by the second-guessing of non-legislators.

Nonetheless, both Petitioners and the *Amici* Secretaries persist in offering alternative proposals for addressing the very real concern of in-person voter fraud. The fatal flaw in their arguments is that neither Petitioners nor the *Amici* Secretaries are empowered to make such legislative decisions. Furthermore, the proposed solutions they offer are impractical, inconsistent with federal law, or completely ineffective against potential in-person voter fraud.

Amici Cox and Willis, former Secretaries of State, praise the still-to-be-developed technologies which might allow an electronic comparison of in-person voters' signatures obtained at the polling place with scanned signatures from voter registration applications. Notwithstanding this hope of an alternative solution to be provided through future technology, in her testimony in the Georgia photo ID case, *Amicus* Cox actually argued against such a solution as being impractical. At that time, when she still bore the official responsibility for assuring fair and accurate elections in the state, *Amicus* Cox testified that either an electronic or even manual signature match done at the polls would be extremely time-consuming and that Georgia lacked the technology to make such comparison. *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1353 (N.D. Ga. 2005). As former Secretary Cox recognized then, the proposal to match signatures at the polls simply presents no real alternative to the photo ID verification process.

Petitioners and the *Amici* Secretaries also propose that persons seeking to register to vote validate

their identity at the time of registration. This proposed solution conflicts with federal law and does little to address the real issue of in-person voter fraud at the polls.

A state's imposition of additional identification requirements for voter registration would be inconsistent with both the National Voter Registration Act of 1993 ("NVRA"), *codified at* 42 U.S.C. § 1973gg, *et seq.*, and the Help America Vote Act of 2002 ("HAVA"), *codified at* 42 U.S.C. § 15301, *et seq.* The NVRA makes it easier for all Americans to register to vote and maintain their registration. *See* 42 U.S.C. § 1973gg(b)(1); *Welker v. Clarke*, 239 F.3d 596, 598 (3d Cir. 2001) ("One of the NVRA's central purposes was to dramatically expand opportunities for voter registration. . . ."). That voter registration process mandated by Congress provides that any qualified individual may register to vote in a wide variety of methods, including by simply mailing in a registration postcard.[2] Likewise, HAVA permits registration by mail without identification as long as the voter then presents one of several forms of identification

[2] Congress recognized that this mail-in voter registration process implicated questions of voter fraud at the polls, and therefore Congress subsequently addressed that issue when enacting HAVA. Under HAVA, first-time voters who register by mail must still show some indicia of reliability as to their identity either when they mail in their registration card or when they first vote after such a mail-in registration. *See* 42 U.S.C. § 15483(b).

when the voter votes for the first time. *See* 42 U.S.C. §§ 15483(b)(1)(A) & (2)(A).

Furthermore, this proposed verification-at-registration process provides no solution to the underlying issue of in-person voter fraud. Merely requiring a voter to show photo ID when registering to vote does not prevent a different voter from voting in person at the original registrant's polling place if there is no photo ID requirement at the polls.

The Indiana General Assembly chose, as did the Georgia General Assembly, to address the potential for voter fraud at the polls through the passage of a photo ID law. These enactments represent the considered judgments of elected representatives regarding how best to address the potential and real issues of voter fraud. Reviewing courts generally should defer to an elected legislature's judgment because "the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which [] judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). The legislative choices made by Indiana, like the similar choices made by the legislature in Georgia, should be respected by this Court, particularly because the burden on the voter, if any, is slight. The partisan litigation which has erupted over photo ID requirements cannot substitute for the give and take of the legislative process that produces a state's laws.

II. The Facts Underlying the *Common Cause / Georgia v. Billups* Decision Support the Upholding of Indiana's Photo ID Requirements.

The *Amici* Secretaries inaccurately recite the underlying facts and legal decisions in the *Common Cause / Georgia v. Billups* litigation in the Northern District of Georgia, in which the district court entered final judgment in favor of the State and upheld the validity of Georgia's photo ID requirement for in-person voting. Most tellingly, the *Amici* Secretaries' discussion in the body of their brief is limited to only the initial version of Georgia's photo ID Act, which was repealed in 2005 and replaced in 2006. It is the latter version of the statute which was reviewed and upheld by the district court in 2007 and which is in effect in Georgia. Indeed, the *Amici* Secretaries refer to the currently effective 2006 Georgia photo ID Act only in a footnote and then only to state (incorrectly) that the district court's most recent decision "lifted its injunction against the amended statute." (Br. for *Amici* Secretaries at 18-20.) In fact, the district court's most recent decision, which totally rejected all challenges to the Georgia photo ID requirement, both on standing and on the substance of the constitutional claims raised, represents much more than the lifting of an "injunction against the amended statute." The decision of the district court presents a thorough discussion of the implementation of a photo ID statute, the appropriate legal analysis that should be used in evaluating the attacks on photo ID

requirements, and an assessment of Petitioners' predictions of rampant disenfranchisement allegedly resulting from a photo ID requirement. All of this valuable and relevant information presents the Court with support for upholding Indiana's own requirements.

A. The Requirements of the Georgia Photo ID Statute.

Under Georgia law, there are six separate designations of the type of government-issued photo IDs which may be used to verify a voter's identity when that voter appears in person at the polls.[3] They include:

> (1) A Georgia driver's license which was properly issued by the appropriate state agency;
>
> (2) A valid Georgia voter identification card issued under [O.C.G.A. §] 21-2-417.1 or other valid identification card issued by a branch, department, agency, or entity of the State of Georgia, any other state,

[3] Under Georgia law, a voter may vote absentee by mail, without providing any excuse for doing so, starting 45 days prior to an election. *See* O.C.G.A. § 21-2-385. Other than HAVA requirements for persons who registered to vote for the first time by mail, there is no photo ID requirement for voting absentee by mail, and absentee voters' identities are verified instead by signature comparison between original voter registration materials and absentee ballot applications. *See* O.C.G.A. § 21-2-386.

or the United States authorized by law to issue personal identification, provided that such identification card contains a photograph of the elector;

(3) A valid United States passport;

(4) A valid employee identification card containing a photograph of the elector and issued by any branch, department, agency, or entity of the United States government, this state, or any county, municipality, board, authority, or other entity of this state;

(5) A valid United States military identification card, provided that such identification card contains a photograph of the elector; or

(6) A valid tribal identification card containing a photograph of the elector.

O.C.G.A. § 21-2-417(a)(1)-(6). If a person appears to vote in person and does not have an acceptable form of identification, that person may vote a provisional ballot which will be counted if the voter's identity is verified within two days after the election. *Id.* §§ 21-2-417(b) & -419. Additionally, if a voter is a first-time voter who registered by mail (and is therefore covered by the identity provisions of HAVA), HAVA's ID requirements are applied rather than the above-listed ones. *Id.* § 21-2-417(c). Finally, if a registered voter does not otherwise have a valid photo ID, the voter can obtain one for free from the county registrar's

office or any location of the Department of Driver Services. *Id.* §§ 21-2-417.1 & 40-5-103(d).

B. After Extensive Discovery, Preliminary Hearings, and a Trial on the Merits, the Georgia Photo ID Statute Was Upheld and Successfully Applied in Elections Conducted in Numerous Jurisdictions Across the State.

Virtually since inception, Georgia's photo ID requirements have been under attack in both state and federal courts. Ultimately, however, all such challenges have been rejected either on their merits or because none of the individual or organizational plaintiffs were able to demonstrate any injury sufficient to provide them with standing to pursue their claims.

Initially, the district court entered a preliminary injunction against enforcement of the original version of the statute, ruling that the lack of availability of a free form of photo ID for voting purposes might, in some circumstances, amount to a poll tax. *See Common Cause/Ga. v. Billups* ("*Common Cause/Ga. I*"), 406 F. Supp. 2d 1326, 1338-39, 1354-55, 1377 (N.D. Ga. 2005). Shortly thereafter, the Georgia General Assembly repealed the 2005 photo ID Act and enacted the 2006 photo ID Act, which provided for the availability of free voter ID cards in all of Georgia's 159 counties.

The district court plaintiffs then amended their complaint to challenge the provisions of the 2006 photo ID Act. *See Common Cause/Ga. v. Billups* (*"Common Cause/Ga. II"*), 439 F. Supp. 2d 1294, 1298 (N.D. Ga. 2006). Over the next three months the district court issued two more preliminary injunctions preventing enforcement of the photo ID requirements in upcoming elections, citing the short period of time since the passage of the photo ID requirement and preserving the status quo while the parties continued to prepare for the ultimate trial on the merits. The first of those preliminary injunctions resulted from a hearing held on July 12, 2006, only six days before the 2006 primaries. *See id.* at 1300, 1360. Although enjoining enforcement of the photo ID requirement in that particular election, the district court noted it would revisit the issue with respect to future elections. *See id.* at 1360. Indeed, the district court had another opportunity to do so two months later when addressing upcoming special elections to be held in September 2006 and again enjoining the enforcement of the photo ID requirement on the eve of these elections. *See Common Cause/Ga. v. Billups* (*"Common Cause/Ga. III"*), 504 F. Supp. 2d 1333, 1341 (N.D. Ga. 2007).

Simultaneously with these challenges in federal court, other plaintiffs attempted state court challenges to the same photo ID statute, alleging that the Georgia General Assembly did not even have the constitutional authority to require voters to identify themselves in any manner when voting. Although a lower court initially found in the plaintiffs' favor, that

ruling was reversed. Despite bringing two separate state court cases, the plaintiffs could never produce a single plaintiff who had standing to pursue this claim, so ultimately the challenge came to naught after review by the Georgia Supreme Court. *See Berry v. Perdue*, No. 06CV4751-7 (DeKalb County Super. Ct. filed Apr. 12, 2006, voluntarily dismissed June 30, 2006); *Perdue v. Lake*, 282 Ga. 348, 647 S.E. 2d 6, 7 (2007).

During the pendency of the state court cases, the district court stayed all proceedings in the federal action. Once the plaintiffs' standing problems had ended the state law challenge, though, the federal case was again ripe to move forward to a trial on the merits in district court. A three-day bench trial was held from August 22 to 24, 2007. *Common Cause/Ga. III*, 504 F. Supp. 2d at 1337, 1342. For their part, the plaintiffs offered a number of witnesses, including two experts, and numerous exhibits.

The district court issued its final judgment on September 6, 2007, rejecting all of the plaintiffs' claims and upholding the constitutionality of Georgia's 2006 photo ID Act. In support of its holding, the court stressed the following points. First, the court emphasized that none of the individual plaintiffs to the litigation had standing to sue, and none of the organizational plaintiffs showed the existence of a member who would be harmed by the 2006 photo ID Act or harm to the organization independent of its membership, either of which would provide the organizations with standing to sue. *See id.* at

1371-74. Second, the court stated that, although the plaintiffs alleged a litany of burdens at the preliminary injunction hearings, they "failed to produce admissible evidence to that effect at trial." *Id.* at 1377. The court explained the distinction between its final judgment and its preliminary injunctions by stating:

> The Court acknowledges that in its previous Orders addressing the preliminary injunction motions, it concluded that the Photo ID requirement severely burdened voters. It is important to note, however, that the preliminary injunction motions were made at an earlier stage of the litigation and were made under more relaxed evidentiary standards. Here, however, Plaintiffs must actually prove their contentions by a preponderance of the evidence, using evidence reduced to an admissible form. Plaintiffs have failed to do so here.

Id. at 1379. Third, the court recognized the State of Georgia's educational efforts, *see id.*, which previously were hampered by both ongoing federal and state court litigation and the requirement that the State of Georgia await Section 5 preclearance on the 2006 photo ID Act, and emphasized that

> the State has undertaken a serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform those voters of the availability of free DDS-issued Photo ID cards or free Voter ID cards, to instruct the voters concerning how to obtain the cards, and to advise the

> voters that they can vote absentee by mail without a Photo ID.

Id. at 1380.

Finally, quoting the Indiana district court decision, the Georgia district court noted that "Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to the [2006 photo ID Act] because of his or her inability to obtain the necessary photo identification." *Id.* (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006)).

> [A]lthough Plaintiffs claim to know of people who claim that they lack Photo ID, Plaintiffs have failed to identify those individuals. The failure to identify those individuals "is particularly acute" in light of Plaintiffs' contention that a large number of Georgia voters lack acceptable Photo ID. . . . As the *Rokita* court noted, voters who lack Photo ID undoubtedly exist somewhere, but *the fact that Plaintiffs, in spite of their efforts, have failed to uncover anyone "who can attest to the fact that he/she will be prevented from voting" provides significant support for a conclusion that the Photo ID requirement does not unduly burden the right to vote.*

Id. (emphasis added) (quoting *Rokita*, 458 F. Supp. 2d at 823).

In short, contrary to the representation of the *Amici* Secretaries and other *amici* who have filed

briefs in support of Petitioners' position, the *Common Cause/Georgia* litigation and concurrent state court litigation in Georgia establish that, despite the two-year efforts of multiple plaintiffs, not a single voter could be located who was unduly burdened by Georgia's requirement for the presentation of a photo ID for in-person voting.

C. No Evidence Exists That Hundreds of Thousands of Georgia Voters Lack Photographic Identification.

The *Amici* Secretaries also allege that 198,000 Georgia registered voters lack photo identification. (Br. for *Amici* Secretaries at 11, 13, 19.) The *Amici* Secretaries throw this number out as if it were an absolute truth, thereby hoping to imply the existence of an enormous number of voters who must be, by the *Amici* Secretaries' rationale, disenfranchised by the Georgia photo ID requirement. As noted above, the actual Georgia experience – as opposed to a hypothetical experience – shows such is not the case.

When the Georgia photo ID statute was first enacted, over the explicit objections of former Secretary Cox, she instructed her staff to attempt to identify the number of registered Georgia voters who might not have either driver's licenses or photo identification cards issued by the Georgia Department of Driver Services ("DDS"), which are but two of the various forms of photo ID allowable under the Georgia statute. An attempt was made to match the

voter registration list with the list of DDS license or ID cardholders. After the first attempt produced a product full of documented errors, the State Election Board ordered an additional attempt, which resulted in a list that was reduced from the original by almost two-thirds but still flawed. Secretary Handel's more recent third attempt produced the 198,000 figure referred to by the *Amici* Secretaries, but it too contained errors.

The comparison between voter registration records and records for two of the allowable forms of photo ID has proved over time and through various iterations to be neither simple nor overwhelmingly accurate. The estimated numbers of non-matches between the voter registration list and the DDS database fluctuates, depending on the criteria used to define the matching files. The massive amounts of information contained in both agencies' databases is not easily correlated and matched. Data transcription and input errors, as well as missing data, undermine the reliability of the comparisons. Indeed, the matching processes produced many "false positives" (people with driver's licenses or photo ID cards issued by DDS but nonetheless appearing on the no-match list anyway).

The district judge in the *Common Cause/Georgia* litigation recognized that the voter registration-DDS comparison was and continues to be a less than accurate estimation. *See Common Cause/Ga. III*, 504 F. Supp. 2d at 1378 ("[T]he testimony in the record established that the large numbers reported on the

DDS no-match list were far from reliable."). In fact, that federal district judge was himself inaccurately included on the first no-match list. *See id.* at 1378 n.6 (noting, in discussing unreliability of the no-match lists, that "the undersigned appeared on one of the no-match lists"). Additionally, the results of the match, whatever they were from day to day and depending on the criteria applied, was less than probative because the matches could not or did not take into account the numerous other types of photo identification that qualify for in-person voting under the Georgia requirement. *See* O.C.G.A. § 21-2-417(a).

As is discussed further in section III *infra* and contrary to the allegation by *Amici* Secretaries that "hundreds of thousands" of Georgia voters have been harmed (Br. for *Amici* Secretaries at 13), Georgia's real-life and practical experience has shown that there is no such disenfranchisement caused by a photo ID requirement. To some extent, Georgia has now conducted the ultimate "scientific experiment" to test the photo ID requirement – actual elections using the photo ID requirement – without any of the dire consequences occurring, as propounded by both Petitioners and the *amici* who support their position before this Court.

Indeed, the Georgia experience comports with Justice Stevens' urging in *Purcell v. Gonzalez*, __ U.S. __, 127 S. Ct. 5 (2006), where he noted:

> Allowing the election to proceed without enjoining the statutory provisions at issue will

> provide the courts with a better record on which to judge their constitutionality. At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements. Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.

127 S. Ct. at 8 (Stevens, J., concurring). Georgia has shown that there is no scope at all to the alleged disenfranchisement of voters and, with the implementation of a photo ID requirement, the state is finally given the opportunity, actually and meaningfully, to verify a voter's identification at the polling place.

D. The District Court in the *Common Cause / Georgia* Litigation Found That the Evidence *Amici* Secretaries Cite Regarding the Georgia Photo ID Law's Effect on the Poor, the Elderly, and Minorities Was Unreliable and Consequently Inadmissible.

Petitioners and the *Amici* Secretaries also allege as ironclad fact claims that photo ID laws more adversely affect elderly, poor, and minority voters because these voters are less likely to have the

required photo identification. (Br. for Ind. Democratic Party Pets. at 12 n.8, 16-17, 34; Br. for Crawford Pets. at 13; Br. for *Amici* Secretaries at 10-13.) The *Amici* Secretaries even state that this allegation is "consistent with the[ir] experience" in Georgia and cite as support a paper by University of Georgia professors M.V. Hood III and Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute* 19 (2007), *available at* http://www.votecaltech.edu/VoterID/GAVoterID (Bullock-Hood).pdf. Such claims are in direct conflict with the evidence presented at the Georgia trial on the merits and as evaluated by the district court.

The *Amici* Secretaries have declined to discuss the fact that the plaintiffs in the *Common Cause/Georgia* litigation attempted to offer Dr. Hood, the source of the data on which they rely, as an expert based on the aforementioned paper and another report he prepared. However, the district court excluded Dr. Hood's testimony, his paper, and his report as inadmissible pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Furthermore, the paper now relied on by Petitioners and the *Amici* Secretaries was at the time of trial still undergoing a peer review process and, based upon comments previously made, the authors had been requested to revise and resubmit the paper because of flaws in the analysis. *See Common Cause/Ga. III*, 504 F. Supp. 2d at 1371 ("Dr. Hood's opinions and testimony fail to satisfy *Daubert*, and, for the most part, are irrelevant to the issues before the Court.").

Accordingly, despite the representations by Petitioners and the *Amici* Secretaries, there is absolutely no probative evidence from the *Common Cause/Georgia* litigation that photo ID laws affect elderly, poor, and minority voters more adversely than other voters. *See Common Cause/Ga. III*, 504 F. Supp. 2d at 1378 ("Further, although Plaintiffs contended at the preliminary injunction hearing that many voters who lack an acceptable Photo ID for in-person voting are elderly, infirm, or poor, and lack reliable transportation to a DDS service center or a county registrar's office, the evidence in the record fails to support that contention.").

III. There Is No Evidence to Support the Allegation or Prediction That Any Individual Voter's Right to Vote Is Burdened by the Photo ID Laws in Either Indiana or Georgia.

The challenges to photo ID laws across the country have been based primarily upon the "Chicken Little" paranoia that there are hundreds of thousands of voters who may lack the required photo ID to vote in person at the polls, are unable to get the required photo ID, and therefore would be completely prohibited from voting. The truth lies elsewhere.

First, there is absolutely no support for the notion that there are hundreds of thousands of people with none of the acceptable forms of photo ID. In fact, after hearing all of the evidence in the case and even allowing the record to remain open for the plaintiffs

to attempt to gather evidence of people being disenfranchised by the requirement, the district court in Georgia concluded precisely the opposite. "[A]lthough Plaintiffs claim to know of people who claim that they lack Photo ID, Plaintiffs have failed to identify those individuals. The failure to identify those individuals 'is particularly acute' in light of Plaintiffs' contention that a large number of Georgia voters lack acceptable Photo ID." *Common Cause/Ga. III*, 504 F. Supp. 2d at 1380 (quoting *Rokita*, 458 F. Supp. 2d at 823).

Second, there is no evidence to support the charge that any voter who may not have one of the required forms of photo ID is unable to obtain one. In the trial of both the Indiana and Georgia cases, "[d]espite apocalyptic assertions of wholesale voter disenfranchisement," the plaintiffs have failed to produce "a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to [the photo ID law] because of his or her inability to obtain the necessary photo identification." *Rokita*, 458 F. Supp 2d at 822; *see also Common Cause/Ga. III*, 504 F. Supp. 2d at 1377-78 (reviewing circumstances of each plaintiff and concluding that no undue burden existed as to any of them). Secretary Handel has commenced a broad-scale education program, as did Secretary Rokita, designed to inform voters of the photo ID requirement, ensure that voters who might need a photo ID know how to obtain one, and make certain that election officials are educated about the photo ID requirement and the free IDs. In the federal case and two state cases in Georgia, despite the constant protestations that

hundreds of thousands of people would be disenfranchised by its application, not a single individual plaintiff or organization with *standing* to challenge the photo ID law ever came forward, much less provided any evidence of an undue burden on the right to vote caused by the photo ID requirement.

Finally, since entry of final judgment in the *Common Cause/Georgia* case upholding the Georgia photo ID requirement, 246 jurisdictions in Georgia have conducted elections in which photo IDs were required for in-person voting. In all of those 246 elections, which have been held in both large and small counties and cities throughout the state, a combined total of less than 50 registered voters have shown up at the polls without a photo ID, and those that have shown up without a photo ID have been allowed to vote a provisional ballot and return within two days with their photo ID.[4]

In short, Georgia has now held elections which allow the Court to review photo ID laws in accordance with Justice Stevens' recommendation that such laws be resolved on "historical facts rather than speculation." *Purcell*, 127 S. Ct. at 8. The overwhelming and undisputed result, based on actual facts, is that photo ID

---

[4] Although *Amicus* Cox alleges that she is aware of one voter who was unable to vote in a recent municipal election (Br. for *Amici* Secretaries at 15), *Amicus* Cox never reported that alleged problem to her successor, did not take advantage of the 1-800 help line, or call any of Secretary Handel's election division staff (some of whom previously worked for *Amicus* Cox) to inform them of the alleged problem.

laws do not unduly burden the right to vote in violation of the U.S. Constitution.

CONCLUSION

For the reasons set forth above, *amicus curiae* urges the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

MARK H. COHEN*
TROUTMAN SANDERS LLP
5200 Bank of America Plaza
600 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 885-3597
**Counsel of Record*

THURBERT E. BAKER
Attorney General of Georgia
DENNIS R. DUNN
Deputy Attorney General
STEFAN E. RITTER
Senior Assistant Attorney General
STATE LAW DEPARTMENT
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-5614

ANNE W. LEWIS
STRICKLAND BROCKINGTON LEWIS LLP
Midtown Proscenium, Suite 2000
1170 Peachtree Street, N.E.
Atlanta, Georgia 30309
(678) 347-2200